Shankar RP Asnani (Advocate & Solicitor, a sole proprietor practising under the name and style of Messrs Thomas, Shankar Ram & Co) v Vestime Corp Sdn Bhd & Anor

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KG 24–316 OF 2006–1
CLEMENT SKINNER J
3 JUNE 2011

Legal Profession — Remuneration — Bill of costs — Defendants signed retainer to engage plaintiff for various legal work — Whether defendants bound by terms of retainer — Whether allegations of breach of retainer and negligence by plaintiff bona fide — Whether plaintiff entitled to tax bill of costs

The plaintiff, a lawyer, sued the defendants for his fees for work done for the first defendant ('Vestime'). The second defendant ('Rosman'), was the managing director of Vestime, and had contracted to be personally liable to the plaintiff for his fees. In 2003, Vestime and another company, YBLE, jointly incorporated a company, Pati Usaha Sdn Bhd ('Pati Usaha') to undertake a contract awarded by the Ministry of Defence ('the Mindef contract') to YBLE to train youths under the National Service Programme. A dispute arose between Vestime and YBLE over the way money paid under the Mindef contract was being dealt with, which led to YBLE suing Vestime in the Kuching High Court ('the first suit'). YBLE terminated its partnership agreement with Vestime and informed the latter that Pati Usaha no longer had the right to undertake the Mindef contract. By this time, monies payable under the Mindef contract were due and Vestime urgently needed to injunct YBLE from dealing with the monies and also to appoint a receiver and manager for Pati Usaha ('the intended suit'). Rosman signed a retainer appointing the plaintiff to act for Vestime in both the first suit and the intended suit. Under the retainer, Vestime agreed to pay the plaintiff's fees and Rosman agreed to be personally liable for it. The plaintiff filed the intended suit and obtained an injunction against YBLE and its directors from dealing with payments received under the Mindef contract and appointed a receiver and manager for Pati Usaha. The defendants engaged the plaintiff to handle various other legal works such as responding to the appeal by the defendants against the injunction, taking committal proceedings against YBLE's directors for non-compliance with the injunction, acting for another defendant in the first suit and preparing and filing a defence and counterclaim for that defendant. Disputes later arose between the defendants, the receiver and manager and the plaintiff. The defendants and YBLE entered into a deed of settlement in respect of the two suits wherein the receiver and manager's fees was provided for but not the plaintiff's. The plaintiff insisted the defendants honour their commitment to pay his fees but

they were not willing to pay anything more than the RM180,000 they had already paid him. The plaintiff applied to discharge himself as solicitor for Vestime, sent them his invoice for professional fees and later filed the instant originating summons where, inter alia, he asked for his bill of costs to be taxed. The defendants asked for the originating summons to be dismissed on the grounds, inter alia, that: (i) the retainers were void and unenforceable as the defendants were pressured into signing them; (ii) the plaintiff had agreed his total fees until the end of the trial was RM100,000; and (iii) the plaintiff had breached his retainer and was negligent in the appointment of the receiver and manager and, therefore, was not entitled to any payment. Based on these grounds, the defendants 'counterclaimed', inter alia, for the retainers to be set aside and all sums they had paid to the plaintiff to be refunded, a declaration that Rosman was not liable to pay any fees to the plaintiff and for damages.

Held, allowing the plaintiff's claim with costs and dismissing the counterclaim with costs:

(1) The retainers signed by the defendants clearly stated that RM100,000 was a non-refundable deposit paid towards the full fees payable to the plaintiff. The alleged 'assurance' and 'oral agreement' entered into with the plaintiff about RM100,000 being his total fees payable was nothing more than a contrived allegation (see paras 30 & 34).

(2) Rosman was not under any sort of pressure to appoint the plaintiff. His was a bare allegation without more (see para 34).

(3) None of the allegations regarding the plaintiff's breaches of his retainer and negligence nor any of the other issues raised by the defendants had sufficient prima facie plausibility to give rise to bona fide issues which called for further investigation (see para 49).

(4) The defendants had clearly signed the retainers agreeing to pay the plaintiff his fees in the terms set out therein. They were bound by what they had signed. Since the defendants did not agree to the quantum of fees claimed, the plaintiff was entitled to have his bills taxed by the court (see para 49).

[Bahasa Malaysia summary

Plaintif, seorang peguam, menyaman defendan-defendan bagi finya untuk kerja yang dilakukan untuk defendan pertama ('Vestime'). Defendan kedua ('Rosman'), merupakan Pengarah Urusan Vestime, dan telah berkontrak untuk bertanggungjawab secara peribadi kepada plaintif untuk finya. Dalam tahun 2003, Vestime dan satu lagi syarikat, YBLE, secara bersama menubuhkan satu syarikat, Pati Usaha Sdn Bhd ('Pati Usaha') untuk melakukan suatu kontrak yang diberikan oleh Kementerian Pertahanan ('kontrak Mindef') kepada YBLE untuk melatih pemuda-pemuda di bawah program khidmat negara. Pertikaian timbul di antara Vestime dan YBLE mengenai cara bagaimana wang

dibayar di bawah kontrak Mindef diuruskan, yang membawa kepada YBLE menyaman Vestime di Mahkamah Tinggi Kuching ('guaman pertama'). YBLE membatalkan perjanjian perkongsiannya dengan Vestime dan memberitahu Vestime bahawa Pati Usaha tidak lagi mempunyai hak untuk melakukan kontrak Mindef. Sebelum ini, wang yang perlu dibayar di bawah kontrak Mindef tertunggak dan Vestime perlu segera menghalang YBLE daripada menggunakan wang tersebut dan juga melantik penerima dan pengurus untuk Pati Usaha ('guaman yang diniatkan'). Rosman menandatangani retainer melantik plaintif untuk bertindak bagi Vestime dalam kedua-dua guaman pertama dan guaman yang diniatkan. Di bawah retainer tersebut, Vestime bersetuju untuk membayar fi plaintif dan Rosman bersetuju untuk bertanggungjawab terhadapnya. Plaintif memfailkan guaman yang diniatkan dan memperoleh injunksi terhadap YBLE dan pengarah-pengarahnya daripada berurusan dengan bayaran yang diterima di bawah kontrak Mindef dan melantik penerima dan pengurus untuk Pati Usaha. Defendan-defendan melantik plaintif untuk menangani lain-lain kerja guaman seperti membalas rayuan oleh defendan-defendan terhadap injunksi tersebut, memulakan prosiding pemenjaraan terhadap pengarah-pengarah YBLE bagi ketidakpatuhan injunksi tersebut, bertindak untuk satu lagi defendan dalam guaman pertama dan menyediakan dan memfailkan pembelaan dan tuntutan balas untuk defendan itu. Pertikaian kemudian timbul di antara defendan-defendan, penerima dan pengurus dan plaintif. Defendan-defendan dan YBLE memasuki surat ikatan penyelesaian berkaitan dengan dua guaman di mana fi penerima dan pengurus diberikan tetapi bukan fi plaintif. Plaintif mendesak defendan-defendan menghormati komitmen untuk membayar finya tetapi mereka tidak ingin membayar apa-apa lebih daripada RM180,000 yang telah mereka bayar kepadanya. Plaintif memohon untuk melepaskan dirinya sebagai peguamcara Vestime, menghantar kepada mereka invoisnya untuk fi profesional dan kemudian memfailkan saman pemula ini di mana, antara lain, dia meminta untuk bil kosnya untuk ditaksir. Defendan-defendan meminta saman pemula tersebut ditolak atas alasan, antara lain, bahawa (i) retainer tersebut adalah terbatal dan tidak boleh dilaksanakan kerana defendan-defendan didesak untuk menandatanganinya; (ii) plaintif telah bersetuju keseluruhan finya sehingga tamat perbicaraan adalah RM100,000; dan (iii) plaintif telah memungkiri retainer dan cuai dalam pelantikan penerima dan pengurus dan, oleh demikian tidak berhak untuk apa-apa bayaran. Berdasarkan alasan-alasan ini, defendan-defendan menuntut balas, antara lain, untuk retainer diketepikan dan kesemua jumlah yang mereka telah bayar untuk plaintif dibayar semula, satu deklarasi bahawa Rosman tidak bertanggungjawab untuk membayar apa-apa fi kepada plaintif sebagai ganti rugi.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas dengan kos:

(1) Retainer yang ditandatangani oleh defendan-defendan jelas menyatakan

bahawa RM100,000 adalah deposit yang tidak boleh dikembalikan kepada fi penuh yang boleh dibayar kepada plaintif. 'Assurance' yang didakwa dan 'oral agreement' yang dimasuki dengan plaintif mengenai RM100,000 sebagai jumlah keseluruhan fi yang perlu dibayar tidak lebih daripada dakwaan yang dibuat-buat (lihat perenggan 30 & 34).

(2) Rosman tidak berada bawah apa-apa bentuk tekanan untuk melantik plaintif. Ia adalah dakwaan semata-mata dan tidak lebih daripada itu (lihat perenggan 34).

(3) Tidak ada apa-apa dakwaan berkaitan dengan kemungkiran plaintif terhadap Retainer dan kecuaian atau mana-mana isu lain yang dibangkitkan oleh defendan-defendan mengandungi kemunasabahan prima facie untuk membangkitkan isu bona fide yang membolehkan siasatan lanjut (lihat perenggan 49).

(4) Defendan-defendan jelas telah menandatangani Retainer bersetuju untuk membayar plaintif finya di dalam terma-terma yang terkandung di dalamnya. Mereka terikat oleh apa yang mereka tandatangani. Oleh sebab defendan-defendan tidak bersetuju dengan kuantum fi yang dituntut, plaintif berhak untuk bilnya ditaksir oleh mahkamah (lihat perenggan 49).]

Notes:

For cases on bill of costs, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1908–1917.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Eng Mee Yong v Letchumanan [1979] 2 MLJ 212, PC (refd)

Shankar Ram (Thomas Shankar Ram & Co) for the plaintiff.
Arthur Lee (Arthur Lee, Lin & Co) for the plaintiff in respect of the defendants' counterclaim.
Bong Ah Loi (Suhaili & Song) for the first and second defendants.

Clement Skinner J:

[1] This suit, commenced by way of an originating summons, concerns a claim by a lawyer for his fees. The facts giving rise to the claim are these.

[2] The plaintiff is Mr Shankar RP Asnani of the legal firm Messrs Thomas, Shankar Ram & Co of Kuching ('the plaintiff'). The defendants are Vestime Corp Sdn Bhd ('the first defendant' or 'Vestime') and one Rosman bin Abu Samah ('the second defendant' or 'Rosman'). Rosman is the Managing Director of Vestime.

[3] In 2003 the government initiated a programme through the Ministry of Defence ('MINDEF') to train youth, called the National Service Programme. MINDEF entered into a five year contract with a company called YBLE Resources Sdn Bhd ('YBLE') whereby YBLE would make available a site and training facilities at which the youth could be trained ('the MINDEF contract'). In return YBLE would be paid various sums of money by MINDEF.

[4] On 3 March 2003 YBLE and Vestime entered in a partnership agreement to perform the MINDEF contract. For this purpose the parties incorporated a company called Pati Usaha Sdn Bhd ('Pati Usaha') as the vehicle to undertake the MINDEF contract. The shareholding in Pati Usaha was to be 70% for Vestime and 30% for YBLE.

[5] Vestime and YBLE soon came into dispute over the way money payable under the MINDEF contract was being dealt with. One of the main complaints was that money paid by MINDEF was not reaching Pati Usaha so as to enable the latter to carry out the MINDEF contract.

[6] On 9 March 2005 YBLE commenced legal action against Vestime at the High Court, Kuching in Suit 22–27 of 2005-lll (I) ('the first suit'). Vestime engaged the legal firm of Messrs JB Singh Associates to fight the first suit, Vestime then commenced a suit against YBLE in the Kuala Lumpur High Court but the suit was struck out for duplicity.

[7] Despite the efforts of MINDEF to mediate in the dispute between the parties they did not resolve their differences because on 11 November 2005 YBLE wrote to Vestime informing the latter of the termination of the partnership agreement (and a supplementary agreement). Vestime was also informed that Pali Usaha no longer had a right to undertake the MINDEF contract. By this time monies payable under the MINDEF contract were due. It was obvious that Vestime needed to act to protect its position and that of Pati Usaha. So too the money payable by MINDEF. However Vestime was very unhappy with the services of Messrs JB Singh Associates.

[8] On 10 December 2005 Mr Shankar Asnani the plaintiff was in Shah Alam. While there he attended a meeting at the offices of a law firm Messrs Jamaludin Ibrahim & Associates. Rosman, En Jamaluddin Ibrahim, Ms Indrani a lawyer in that firm and one Mr Ernest Azzad were present. At this meeting one of the matters discussed was the plaintiff's fees. More will be said shortly about this but according to the defendants, at that meeting the need to obtain an injunction against YBLE and the appointment of a receiver and manager were also discussed.

[9] On 15 December 2005 the plaintiff sent a third draf statement of claim

in respect of a proposed suit against YBLE. On that day Messrs Jamaluddin Ibrahim & Associates confirmed the third draft was in order.

[10] On 17 December 2005 Rosman the second defendant here signed a written retainer in respect of the plaintiff's services in both the first suit and the proposed suit. By this retainer Vestime agreed to pay and Rosman agreed to be personally liable for the plaintiff's fees in the following terms:

> 2 That Vestime Corporation Sdn Bhd. shall pay as fees in accordance with the advocates fee scale in Sarawak, the Advocates Remuneration Rules of 1988, to do and or cause to be done all acts and things necessary or expedient in the prosecution, conduct and or settlement of tie above mentioned matter (1) and (2) (i.e.matter (1) referred to the proposed suit and matter (2) referred to the 1st suit) and Vestime Corporation Sdn Bhd. will further agree and confirm to pay all charges and fees as set out in the Schedule herein below:
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> Schedule of Fees
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> (i) RM100,000,00 as a one lumpsum deposit on fees for conduct of matter (1) above i.e. the proposed suit;
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> (ii) Reasonable fees to be agreed for matter (2) above le. Kuching High Court Suit No. 22-27-2005 III Le. the 1st suit;
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> (iii) All expenses, costs including costs ordered against Vestime Corporation Sdn. Bhd) to be billed as and when basis and when required is to be paid/borne by Encik Rosman Bin Abu Samah personalty and by Vestime Corporation Sdn. Bhd;
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> (iv) To pay all final agreed professional fees and/or other fees due or owing, Vestime Corporation Sdn. Bhd and Encik Rosman Bin Abu Samah have agreed to pay to us all taxed costs awarded to Vestime Corporation to be paid towards our final fees;
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> (v) To pay all other charges, fees, service tax (previously 5%) and expenses including consultation charges as Senior Counsel - upon agreement) incurred on behalf of Vestime Corporation Sdn. Bhd in the above matters (1) and (2) (i.e. proposed suit and 1$t suit) - Your Encik Rosman Bin Abu Samah had agreed to pay Singapore Dollars RM5,000.00 as fees for Mr M. Kumaran of Messrs. Bernard Rada & Lee Law Corporation, Singapore and also pay all his flight fares, expenses and costs for trips to Kuching on 14, 15th, 16th and 17th December 2005;
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> (vi) That Vestime Corporation Sdn Bhd and Encik Rosman Bin Abu Samah understand that all the costs, expenses and fees paid above for matters (1) and (2) (i.e. proposed suit and 1st suit) shall not be refundable and are agreed fees AND also agree to pay all other costs related to, arising out of, in connection with and incidental to the conduct, execution and or settlement of the above-mentioned matter;
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> (vii) In the event that there is any appeal of whatever nature from the declsion/s, ruJing/s and or Judgments of the Court/Deputy Registrar/Senior Assistant

Registrar in the said matters (1) and (2) (i.e, intended suit and 1st suit) above or from the said claim/s and from the Fresh Action, Vestime Corporation Sdn. Bhd and Encik Rosman bin Abu Samah agree to retain Messrs Thomas, Shankar Ram & Co advocates afresh and on such other arrangements as to fees and charges to be mutually agreed.

[11] By 19 December 2005 the plaintiff as Vestime's lawyer had commenced the intended suit against YBLE and five other defendants in the High Court Kuching which was numbered Suit 22–169 of 2005–1 ('the second suit'). On 19 December 2005 the plaintiff, on behalf of Vestime obtained an ex-parte injunction to restrain YBLE and its directors from receiving the proceeds of payment under the MINDEF contract.

[12] On 30 December 2005 the Board of Directors of Vestime Corp Sdn Bhd by their directors' circular resolution resolved and signed a written retainer agreeing to engage the plaintiff in respect of the first and second suits on the same terms and conditions as agreed to in the retainer signed by Rosman on 17 December 2005. Both these retainers are exhibited as 'SR1' and 'SR2' to the affidavit affirmed by Mr Shankar Asnani on 15 November 2006 in support of this application.

[13] On 28 February 2006 on the inter-partes hearing of Vestime's application for injunction the court granted orders of injunction, restraining YBLE and its directors from dealing with, diverting or dissipating the monies receivable under the MINDEF contract. The court also appointed Mr David Wong Siew Chow of Moores Roland, Kuching, as the receiver and Manager of Pati Usaha ('the sixth defendant in the second suit').

[14] YBLE and those defendants against whom restraining orders were made in the second suit were dissatisfied and so appealed against it. They also did not comply with the orders made on 28 February 2006. On 31 March 2006 Vestime as well as Rosman signed a written retainer agreeing to engage the plaintiff to oppose the appeal against the order of 28 February 2006. In the same retainer the plaintiff was engaged to commence committal proceedings against the Directors of YBLE for their contempt of the order of 28 February 2006. Vestime and Rosman also agreed to pay the plaintiff RM 60,000 (excluding costs and expenses) for the appeal and RM45,000 for the committal proceedings. They further agreed that both of such fees were non-refundable. The retainer signed by Vestime and Rosman in respect of the appeal and committal proceedings is exhibited as 'SR23' to the affidavit of Shankar Asnani affirmed on 15 November 2006.

[15] On 28 April 2006 Rosman on behalf of Vestime signed a letter appointing the plaintiff to act on behalf of the Awangku Mohd Salleh bin

Pengiran Syed Shahminan ('Awangku') who had been sued as a defendant in the first suit. That letter is exhibited as 'SR4' to the affidavit of Shankar Asnani affirmed on 15 November 2006. On 29 April 2006 Awangku himself signed a warrant to Act in respect of the plaintiff.

[16] On 10 May 2006 the plaintiff, on behalf of Awangku, by way of counterclaim in the first suit filed a defence and counterclaim against YBLE and the Directors of YBLE. This defence and counterclaim on behalf of Awangku was approved by Rosman on behalf of Vestime. See 'SR7' of Shankar Asnani's affidavit of 15 November 2006.

[17] By 10 April 2006 the receiver and manager had prepared and filed his interim first report in which his fees charged were disclosed. Between August 2006 and September 2006 the relationship between the plaintiff/Vestime/Rosman/the receiver and manager and his solicitors became soured. Vestime and Rosman were unhappy with the fees charged by the receiver and manager which they regarded as high. The latter in turn was unhappy with the alleged interference in the discharge of his duties by Vestime/Rosman or their Kuala Lumpur lawyers. The plaintiff says that Vestime sought his advice about settling the case with YBLE and had requested him to draft court orders or judgments for that purpose. The plaintiff says that initially Vestime was agreeable to protect his professional fees in the settlement process but later changed its mind.

[18] By September 2006 the plaintiff and the receiver and manager found out that MINDEF had released its second payment of monies but that Vestime and Rosman had not disclosed this to them and had dealt with the moneys in breach of the order of 28 February 2006. On 30 September 2006 the receiver and manager issued his second report and accounts for period 1 March 2006 to 30 September 2006 in which he sets out, amongst others, the interference and differences between the receiver and manager and Vestime/Rosman/their Kuala Lumpur lawyer.

[19] By 3 October 2006 the following events had occurred between the parties. The receiver and manager had applied for and obtained an ex-parte injunction against Vestime, Rosman and Encik Jamaludin Ibrahim (Vestime's Kuala Lumpur lawyer and Director of Pati Usaha) to restrain them from dealing with the monies from MINDEF or interfering with the functions of the receiver and manager (see exh 'SR12B' of Shankar Asnani's affidavit of 15 November 2006); Vestime/Rosman and YBLE had entered into a deed of settlement in respect of the two suits wherein they agreed to pay the receiver and manager's fees but nothing was said about the plaintiff's fees (see 'SR14B' of Shankar Asnani's affidavit of 15 November 2006); the plaintiff had written to Vestime/Rosman's Kuala Lumpur lawyer insisting that they honour their

commitment to pay his fees but their Kuala Lumpur lawyer informed the plaintiff that they were not willing to pay anything more than the RM180,000 they had already paid him and that if the plaintiff was not happy with that amount the plaintiff should proceed to have his bill taxed by the court. The plaintiff was further informed that if he did not agree to applying to the court to record a consent judgment to settle the cases in the terms set out in the deed of settlement, then the plaintiff should discharge himself honourably (see 'SR15', 'SR17' and 'SR10' of Shankar Asnani's affidavit of 15 November 2006).

[20] On 4 October 2008 Vestime wrote to the plaintiff terminating his appointment as its lawyer. On 6 October 2006 the plaintiff filed an application ('encl 197') in this suit to, inter alia, discharge himself as solicitors on record for Vestime. On 10 October 2006 Ms Suhaili & Bong Advocates filed a 'Notice of Change of Advocates' in the first and second suits, giving notice they were solicitors on record for Vestime in place of the plaintiff. On 3 and 7 November 2006 respectively notices of discontinuance of the second and first suits were filed. On 13 November 2006 the plaintiff sent to Vestime's present solicitors his proforma invoice for professional services in the sum of RM520,001.81 with a summary of accounts for settlement.

[21] On 15 November 2006 the plaintiff filed this present originating summons. He prays for various orders but in essence his application is to have his bill of costs taxed by the court. On 17 November 2006 that part of the plaintiff's application to discharge himself (encl 197) was dismissed as events had overtaken that application so as to render it otiose.

[22] Vestime and Rodman are resisting this originating summons and ask for it to be dismissed on the following grounds:

(a) the written retainers are void and enforceable as Vestime/Rosman were pressured into signing them;

(b) that the plaintiff had agreed that his total fees until the end of the trial was RM100,000;

(c) the plaintiff had misrepresented to Roslan that the signing of the written retainer was a mere formality; and

(d) the plaintiff had breached his retainer and was negligent in the appointment of the receiver and manager-therefore he is not entitled to be paid anything as the retainer was an entire contract.

[23] Relying on the above complaints against the plaintiff, Vestime and Roslan 'counterclaimed' for the following reliefs in their affidavit in opposition:

(a) an order to set aside the retainers and for a refund of all sums paid to the plaintiff;

(b) a declaration that Rosman is not liable to pay any fees to the plaintiff;

(c) an order for damages equivalent to the fees paid to the receiver and manager and his advocate in the sum of RM463,000;

(d) an order that the plaintiff pay RM53,000 being the amount paid to Messrs Suhaili & Bong Advocates; and

(e) an order that the plaintiff pay damages to be assessed including for punitive and exemplary damages.

PROCEDURAL POINT

[24] Before addressing the issues raised, there is a procedural point that needs to be considered first.

[25] The question arose during submissions whether the court should order this originating summons to be converted into a writ action in view of the issues raised or alternatively to order a separate hearing of the defendants counterclaim. For reasons that appear shortly, I did not find it necessary or appropriate to order a conversion or order a separate hearing of the defendant's counterclaim.

THE ISSUES RAISED BY THE DEFENDANTS

[26] There is no dispute between the parties that the written retainers were signed and executed by Vestime and Rosman. However, what the defendants are trying to do is to avoid liability under the retainers they have signed by raising in their affidavits in opposition the issues I mentioned earlier. The plaintiff has denied each of these complaints in his affidavits. He also relies on the affidavits filed by the receiver and manager Mr David Wong and his lawyer ('Mr Sunny Si'). In considering the issues raised by the parties in their affidavits I have taken the approach recommended by the Privy Council in *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212 which was approved by our apex court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400. In *Eng Mee Yong* Lord Diplock said this at p 217 para 'F' about the role of a judge before whom a conflict of evidence is raised in the affidavits when deciding a matter on contested affidavits:

> It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

[27] Earlier on at the same page at para 'E' the learned judge said:

Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

[28] Keeping the above approach in mind I turn to the issues raised by the defendants.

RM100,000 was the total fees payable to the plaintiff.

[29] In support of this contention the defendants relied on affidavits affirmed on 23 December 2006 by Roslan, Encik Jamaludin Ibrahim and Ms Indrani to the effect that at the meeting on 10 December 2005 at the firm of Messrs Jamaludin Ibrahim & Associates at Shah Alam, the plaintiff had assured all present that his full fees until completion of trial was RM100,00. But later on by the time Rosman came to file his affidavit in opposition (three) on 2 February 2007 the alleged 'assurance' of the plaintiff regarding his fees had become an 'agreement made with the 1st defendant', and eventually during the submission stage the alleged 'assurance' and 'agreement' had turned into an 'oral agreement' made on 10 December 2005 by reason whereof the parties were said to be bound by this 'prior oral agreement' and not by the written retainers.

[30] I find these assertions highly improbable for the reason that they are contradicted by and inconsistent with the terms of the written retainers signed by Rosman on 17 December 2005 and by Vestime on 30 December 2005 which was just a few days after the meeting on 10 December 2005. Both of these documents very clearly state that RM100,000 was only a non-refundable deposit paid towards the full fees payable to the plaintiff. Rosman is neither a simpleton nor an uneducated person. He is a businessman who knew what he was signing. If there was a grain of truth that the plaintiff had given an assurance that his total fees was only RM100,000 as alleged by Rosman, En Jamaludin and Ms Indrani or if there really was an alleged oral agreement entered into then with the first defendant as alleged it is highly improbable that Rosman would have signed tie retainers in the terms set out or at the very feast he would have raised a query on the retainers with his Kuala Lumpur lawyers or even the plaintiff of which there is no evidence of. Accordingly I find the assertion of Rosman, En Jamaludin and Ms Indrani about an 'assurance' and Roslan's assertion about an oral agreement are nothing but self serving statements which lack sufficient prima facie plausibility to merit further investigation as to their truth.

[31] In their submissions the defendants contended that the plaintiff had never denied their assertion about the agreement reached with him that RM100,000 was his total fees so he is deemed to admit it. I disagree, By para 17(1) of his affidavit affirmed on 5 January 2007 the plaintiff specifically denied there was any such agreement.

[32] I also find the defendants contention that an oral agreement had been reached with the plaintiff on his fees untenable in view of the clear provisions of s 15 of the Advocates Ordinance (Sarawak Cap 110) which requires any agreement with respect to fees payable to a lawyer to be in writing.

Did Rosman sign the retainers underpressure as alleged?

[33] I find this assertion by Rosman not only lacking in precision but also highly improbable in itself. Rosman has not made any attempt to say what it is that the plaintiff had done or said to him that amounted to putting pressure on him. His allegation is a bare allegation without more. It is difficult to believe that Roslan was under any form of pressure as alleged because he signed the retainer on more occasions then one. The second occasion he signed was some 13 days after the first retainer was signed. He has not even stated on which occasion he was under pressure. And the second retainer was signed in the form of a company resolution which was also signed by another officer of the company who has not come forward to say any form of pressure was exerted on him to sign that retainer. Contrary to what he asserts the evidence shows that Rosman was happy to appoint the plaintiff because in para 5.10 of his affidavit affirmed on 23 December 2008 Rosman stated:

> As the 1st Defendant and I are not familiar with any other lawyer in Sarawak, and also the unpleasant experience with JBS (i.e. J.B.Singh Advocates), and added with the pleasant and confidence (sic) image projected by the plaintiff, the 1st defendant agreed to engage the plaintiff to take over the case from JBS.

[34] The above clearly shows that Rosman was not under any sort of pressure to appoint the plaintiff. It also shows that the alleged 'assurance' and 'oral agreement' entered into with the plaintiff about RM100,000 being his total fees payable for this case was nothing more than a contrived allegation since the defendants were engaging the plaintiff for both cases but it is not their case that the RM100,000 was the total fees for both cases.

Alleged misrepresentation

[35] The assertion of Rosman that he signed the two retainers as the plaintiff had assured him they were mere formalities is an assertion that is inherently improbable in itself as it is inconceivable that an educated businessman and

managing director of a company would regard the signing of a document committing his company and himself to personal liability, as a matter of a mere formality.

[36] What I have said about the two retainers will apply with equal force to the third retainer signed by the defendants on 31 March 2008 agreeing to pay the fees of the plaintiff in respect of the appeal against the order of 28 February 2005 and contempt proceedings ie exh 'SR3' to the affidavit of Shankar Asnani of 15 November 2006.

[37] The defendants also took the point in arguments that the first two retainers 'SR1' and 'SR' were unlawful, being champertous in nature since the plaintiff had agreed to take any taxed costs awarded to Vestime, I see nothing in the point taken. Paragraph 2(ii) of both retainers merely states that Vestime and Rosman 'have agreed to pay to us ail taxed costs awarded to Vestime Corporation Sdn Bhd to be paid towards our final fees'. I see nothing objectionable about a lawyer agreeing with his client that all taxed costs that may be awarded to the client will be paid towards the final fees of the lawyer.

Alleged breaches of retainer and negligence

[38] The defendants contend that the plaintiff had breached his retainer and was negligent when he failed to advise that instead of Mr David Wong being appointed as tie receiver and manager, either Vestime or Rosman would have been 'a better person' to be appointed. They say that as a result of the plaintiff's failure Vestime had to pay RM388,00 to the receiver and manager for his fees and a further RM78,000 towards the fees of the receiver and manager's lawyer. The defendants further contend that the plaintiff had failed to query the receiver and manager about his fees and had acted to advance the interest of the receiver and manager instead of the defendants.

[39] I find the above assertions of the defendants are not bona fide allegations. They have been raised merely as a means to defeat the plaintiff's application and to get out of their obligation to pay his full fees which the defendants had each so clearly and unequivocally agreed to pay him in the retainers they signed. I say so for the following reasons.

[40] It is clear to me from all the documents placed before the court that the defendants were happy and eager to appoint the plaintiff as their main priority was to prevent YBLE from getting its hands on the impending release of money by MINDEF. Further, the defendants were not happy with the services of their then lawyer. The defendants also knew that it was vital that Pati Usaha be preserved as a going concern since it was that company which was actually undertaking the MINDEF contract and it could only do so if it was put in

funds from money released by MINDEF. Hence the urgent need for an injunction against YBLE and its directors and the appointment of a receiver and manager in respect of Pati Usaha in which there was a deadlock between the two sides to the joint venture.

[41] The defendants contention that the plaintiff was negligent in not having advised that they should be appointed as receiver and manager instead of Mr David Wong is misconceived. In the first place Vestime as well as Rosman are parties who are directly interested in the litigation and no court property appraised of the facts would allow them to get their hands on the very money which they were trying to prevent YBLE from dealing with. Even further still one of the orders sought when appointing the receiver and manager was that there be 'an enquiry into the accounts of the 6th defendant (ie Pati Usaha) by the Receiver and Manager or such other independent third party'. Accordingly neither Vestime or Rosman would have been suitable. In the second place, a receiver and manager once appointed is answerable to the court in the discharge of his duties. As such the court will only appoint a natural person to act in such capacity so as to be personally liable and not a corporate entity with limited liability such as Vestime.

[42] With regard to the allegation that the receiver and manager had charged high or exorbitant fees which the plaintiff had failed to advise the defendants on before his appointment, the defendants complain that they could have got another person named Mr Shanmuganathan or Mr Navis to act as receiver and manager for only RM50,000 as fees. I find the defendants allegation lacking in candour and bona fides for the following reasons.

[43] When the application for injunction and appointment of receiver and manager was made, Rosman knew that the court had been given two possible names because he had affirmed an affidavit on 17 December 2005 in which he sought by prayer (4) 'An order that Mr David Wong Siew Chow of Moores Roland, Kuching or Dr V Shanmughanathan of SC Corporate Recovery Sdn Bhd Kuala Lumpur or such other person acceptable to this Honourable Cour' be appointed.

[44] The very same application also sought orders that the receiver and manager was to be given the power to manage the affairs of Pati Usaha and submit accounts to the court every six months and that the fees payable to the receiver and manager must either be agreed by the parties to the action or allowed by the court. The contemporaneous undisputed documents show that it was the defendants Kuala Lumpur lawyers who recommended or proposed Mr Shanmuganathan as a receiver and manager (see exh 'SR39' attached to affidavit of Shankar Asnani of 5 January 2009). In the certificate of urgency submitted to the court (see exh 'SR52C' attached to Shankar Asnani's affidavit

of 2 February 2007) which the defendants were aware of as a copy was supplied to them through their Kuala Lumpur lawyer (see 'SR48' of Shankar Asnani's affidavit of 23 January 2007) the court was asked to appoint one of two persons ie Mr David Wong or Mr Shanmuganathan and their respective consent to act was attached to the certificate as 'A' and 'B' respectively for the courts consideration. Mr Shanmuganathan gave his full details but never indicated he would charge RM50,000 only. Nor is there any other document before the court to support the defendants assertion that Mr Shanmuganathan would only charge RM50,000. Mr David Wong also did not indicate his charges. Given the fact that the person appointed by the court would not know for how long the appointment would last or the extent of his involvement it would have been very imprudent for such person to name an all in fee of RM50,000 only for such appointment. It is telling that the defendants have not been able to obtain a confirmation in writing from Mr Shanmuganathan that he would only charge RM50,000 as alleged. Given the fact that Mr Shanmuganathan was based in Kuala Lumpur whereas the operations of Pati Usaha were in Kuching, it was natural that for reasons of cost and expense Mr David Wong would be chosen by the court.

[45] As regards the fees of the receiver and manager, by 5 April 2006 Mr David Wong had submitted his interim first report in which he fully disclosed his fees which were calculated on time costs for him and his staff (see FTK 3A to Francais Teron Kadap's affidavit of 5 January 2007). There is no evidence that the defendants raised any objections to his indicated charges. On the contrary the receiver and manager asserts that at a meeting held on 26 June 2006, Rosman and his Kuala Lumpur lawyer had agreed to the receiver and managers fees. According to the receiver and manager, it was only from August 2006 that his fees became an issue when he refused to comply with certain improper demands allegedly made by the Kuala Lumpur lawyer (see para 9 of 'RS12A' to affidavit of Shankar Asnani of 15 November 2006). In the circumstances there is no basis for the defendants to blame the plaintiff for the allegedly high fees of the receiver and manager. The plaintiff had no control over the latter's fees. Further sufficient care had been taken by the plaintiff in making it a term of the receiver and managers appointment that his fees charged was subject to approval of the parties to the action or of the court. There was accordingly a mechanism available to the defendants to control the fees charged by the receiver and manager if they were genuinely concerned about it. However, when it suited the defendants to do so they readily agreed to settle the receiver and managers fees when they wanted to discontinue the suit. Although the defendants describe their decision as a commercial one, it does not detract in any way from the fact that if, as they now maintain, the receiver and manager's fees was too high and he had made unlawfully payments to himself, they had a means of redress which they voluntarily gave up. It is

unconscionable that they should now try to make an issue about tie receiver and manager's fees as a means to deny the plaintiff of his fees. It certainly lacks bona fides.

[46] The same may be said of the defendants' allegation that the plaintiff conspired with the receiver and manager to obtain an injunction against the defendants on 3 October 2006; I find absolutely no substance in this allegation. The receiver and manager has set out in his affidavit the various acts of interference which led to the granting of an injunction against the defendants on 3 October 2006 (see exh 'SR12A' to the affidavit of Shankar Asnani affirmed on 15 November 2006). These acts of interference are also set out in the receiver and manager's second report (see 'FTK 3B of Francis Teron Kadap's affidavit of 5 January 2007). The defendants cannot be allowed to point an accusing finger of conspiracy at the plaintiff for their own transgressions. It is noteworthy that the allegations against the plaintiff about his working against the interest of the defendants and conspiring with the receiver and manager only arose after 3 October 2006 which is after the plaintiff had warned the defendants to comply with the order of 28 February 2006 and that they honour his retainer on fees. This was also after the defendants had negotiated to settle the suits without making provision for the plaintiff's fees. Before 4 October 2006 when Vestime terminated the services of the plaintiff, the defendants had said nothing about the plaintiffs alleged breaches of retainer. The lack of bona fides on the part of the defendants in raising these allegations against the plaintiff and their unfounded claim that he is not entitled to be paid any fees for his alleged breaches of retainer is exposed even more for all to see when it is considered that even as late as 13 October 2006 the defendants present solicitors had sent a notice to the plaintiff, demanding that the plaintiff tax all his bills in respect of all works done in respect of the first and second suits since the date of his retainer and that if the plaintiff failed to do so within seven days, the defendants would themselves apply to court to tax ail the plaintiffs bills (see 'SR29' of Shankar Asnani's affidavit of 15 November 2006). It is inconceivable that if the defendants genuinely believed the plaintiff was in breach of his retainer and was disentitled to any fees, they would have caused such a letter to be written to the plaintiff. The defendants cannot blow hot and cold. They are now resisting and objecting to the very thing that they themselves had earlier demanded the plaintiff should do in this application — have his bills taxed by the court.

[47] The defendants also allege that the plaintiff tried to put an obstacle in the way of the settlement reached with the other side by not applying for a consent order or judgment in the terms he was requested to but I find the documents show that the plaintiff had quite correctly drawn the defendant's

attention to the fact that any consent order or judgment would need to take into account the order of 28 February 2006 and the position of the receiver and manager.

[48] The defendants also complained that the plaintiff had breached his retainer when he attempted to use Awangku to sue the defendants. I find that this allegation, just like the other allegations made by the defendants about the plaintiff's breach of his retainer, is baseless and not made bona fide. In the first place the plaintiff brought action on behalf of Awangku against the defendants only after his services as the defendants' lawyer was terminated on 4 October 2006. In the second place, the issue about Awangku was only raised late in the course of the proceedings in the affidavit of Rosman of 16 February 2007 which shows that this issue was raked up in an attempt to create an issue where there was none,

[49] For all the reasons given above I find none of the allegations regarding the plaintiffs alleged breaches of his retainer and negligence nor any of the other issues raised by the defendants have sufficient prima facie plausibility to give rise to bona fide issues which calls for further investigation. The defendants counterclaim being founded on their baseless allegations must likewise fail and be dismissed. The defendants had clearly signed the retainers agreeing to pay the plaintiff his fees in the terms set out therein. They are bound by what they have signed. Since the defendants do not agree to the quantum or amount of fees claimed, the plaintiff is entitled to have his bills taxed by the court.

[50] I accordingly grant judgment in favour of the plaintiff with costs in the following terms:

(a) in respect of Kuching High Court Suit 12–27 of 2005-lll(i) there will be orders in terms of prayer (A) (1), (2) and (3) of the application; and

(b) in respect of Kuching High Court Suit 22–169 of 2005–1 there will be orders in terms of prayers (B) (4), (5), (9) and 10.

[51] I have not granted prayers (6), (7) and (8) sought in this suit as the parties have discontinued the action. Therefore the question of there being 'taxed costs' in this suit does not arise at all.

[52] I dismiss the defendants 'counterclaim' with costs.

Plaintiff's claim allowed with costs and 'counterclaim' dismissed with costs.

Reported by Ashok Kumar